

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 May 2012

Public Authority: Department for Education
Address: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Decision (including any steps ordered)

1. The complainant requested information which the Department for Education (the "DfE") had used in order to make its provisional decision in relation to its funding position for the Building Schools for the Future programme for Sandwell Metropolitan Borough Council ("Sandwell MBC"). This information was withheld under the formulation of government policy exemption (section 35) and the legal professional privilege exemption (section 42). The complainant only challenged the DfE's use of section 35, and therefore this decision notice has only considered the information withheld under this exemption alone.
2. The Commissioner's decision is that the DfE has correctly withheld this information under section 35(1)(a).
3. Therefore the Commissioner does not require the DfE to take any steps.

Request and response

4. The Building Schools for the Future ("BSF") programme was announced in 2004, and was intended to rebuild every secondary school in England. In July 2010 the Secretary of State for Education announced an overhaul of capital investment in England's schools, which included an

end to the BSF programme.¹ This effectively meant that some school projects would not go ahead. Six local authorities (including Sandwell MBC) subsequently sought a judicial review of the decision to cancel their school projects. As a result of the judicial review the DfE was required to revisit its decision on BSF funding in relation to these authorities.² Subsequently the Secretary of State wrote to these authorities on 19 July 2011, and set out his provisional decision in relation to the provision of this funding. This letter gave the authorities the opportunity to make further representations before a final decision was made. The request in question in this case was made shortly after the local authorities in question were informed of the Secretary of State's provisional decision.

5. The complainant wrote to the DfE on 28 July 2011. She referred to the letter from the DfE dated 19 July 2011 which had set out the provisional decision regarding the provision of BSF funding, and made the following request:

"Please provide copies of all reports, submissions, minutes of meetings and discussions, notes, emails, letters and any other relevant document upon which the Provisional Decision is based."

6. The DfE responded in a letter dated 23 August 2011. It confirmed that it held relevant information, but stated that it was exempt under sections 35 and 42.
7. The complainant wrote to the DfE on 18 October 2011 and requested an internal review. The complainant noted that she was not seeking to challenge the use of section 42.
8. The DfE carried out an internal review, and responded on 29 December 2011. It informed the complainant that after reviewing the request it still considered that the requested information was exempt under sections 35 and 42.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way her request for information had been handled. Specifically she complained about the DfE's use of section 35(1)(a).
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¹ <http://www.education.gov.uk/inthenews/inthenews/a0061486/overhaul-to-englands-school-building-programme>

² <http://www.bailii.org/ew/cases/EWHC/Admin/2011/217.html>

10. Therefore the scope of this case is to consider whether the DfE was correct to rely upon section 35(1)(a) to refuse to disclose the information withheld under that exemption alone. The Commissioner has not gone on to consider the DfE's use of section 42 to withhold the remaining information.

Reasons for decision

11. Section 35(1)(a) of the FOIA states that information held by a government department is exempt if it relates to the formulation or development of government policy. This is a class based exemption, and therefore if the information is of the type specified in the exemption, that exemption is engaged.
12. In order to reach a view on whether this information should be withheld under this exemption the Commissioner has first considered whether it relates to the formulation or development of government policy.
13. In the Commissioner's view, the term 'relates to' should be interpreted broadly to include any information which is concerned with the formulation or development of the policy in question and does not specifically need to be information on the formulation or development of that policy.
14. In this case the withheld information relates to the government's policy on the future of the BSF programme, and in particular regarding the future provision of BSF funding for the six local authorities who brought the judicial review. The Commissioner is satisfied that the withheld information relates to the process in which the Secretary of State reached his provisional decision on the provision of BSF funding for these local authorities. As such he is satisfied that it relates to the formulation and development of that policy. He is also satisfied that the request was made at a time when the policy was still in a process of both formulation and development.
15. Bearing this in mind the Commissioner finds that section 35(1)(a) is engaged.
16. Section 35(1)(a) is subject to a public interest test. As such, the information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner has first considered the public interest in disclosure.
17. The DfE has recognised that there is a public interest in openness and transparency. In particular, disclosure would be in the public interest as knowledge of the way Government works increases if information on

which decisions have been made is publicly available. This can increase the public's ability to effectively contribute to the policy making process. It has also recognised that there is a public interest in being able to see if Ministers are being effectively briefed on the key areas of policy that the DfE is taking forward, and that decisions are being undertaken on a clear understanding of the facts. Finally, it has recognised that the decisions taken in relation to the BSF programme in July 2010, which effectively meant that a number of school projects would not now go ahead, were controversial and sensitive. The judicial review brought by a number of local authorities, including Sandwell MBC, ensured that at the time of the request this issue continued to be one of significant sensitivity. Increasing public understanding of this controversial and sensitive issue would be in the public interest.

18. In favour of maintaining the exemption, the DfE has argued:

- It is in the public interest that the formulation of government policy and decision making can proceed in the self-contained space needed to ensure that it is done well.
- In particular there is a strong public interest in enabling Ministers to consider and decide on policy in a safe space. This request focuses on the decision making process in the formulation and development of a controversial and sensitive policy. At the time of the request, this was still a live issue and the Secretary of State had yet to make a final decision. This decision making process would involve the expenditure of large sums of public money, and had a range of possible outcomes that needed to be considered. At the time of the request it was also subject to separate ongoing legal processes. Bearing these points in mind, the public interest in maintaining this 'safe space' is particularly strong in this case.
- Good government depends on good decision making, and this needs to be based on the best advice available and a full consideration of options. Without protecting the thinking space and the ability for Ministers, and senior officials, to receive free and frank advice, there is likely to be a corrosive effect on the conduct of good government, with a risk that decision making will become poorer. This could result in weaker government.
- The withheld info contains advice for the Secretary of State on a highly controversial subject area, with strongly held views across the spectrum. It is particularly important that the advice provided to Ministers should be as clear and frank as possible when a topic is controversial and affects the education of

children. If officials felt that this advice was to be released, then they may not express themselves freely and completely.

The Commissioner considers these to be 'safe space' and 'chilling effect' arguments.

19. In reaching a decision as to the balance of public interest arguments the Commissioner has been mindful of the particular circumstances of this case. He has also had to consider the circumstances at the time the request was made.
20. The Commissioner considers that the public interest factors in favour of disclosure are strong in this case. The decisions taken in relation to the BSF programme in July 2010 represented a major change to the BSF policy, which would have a potential impact on existing schools and the provision of education, and would potentially involve the expenditure of public money. These decisions were controversial and attracted a lot of attention, both publicly and politically.
21. The subsequent judicial review sought by six local authorities (including Sandwell MBC), and its outcome, ensured that at the time of the request this issue continued to be one of great sensitivity, that was still controversial, and was still a matter of debate. Although at the time of the request the matter of BSF funding for Sandwell MBC (and the other appellant local authorities) had yet to be settled, whatever the final decision was this would have a major impact on school buildings (and consequently the provision of education) in this area. Therefore, the Commissioner considers that the public interest in increasing transparency and accountability of this decision making process particularly strong.
22. In particular, given the level of debate about the decisions made on the future of the provision of BSF funding, and the outcome of the judicial review, he considers that increasing public understanding of formulation and development of this policy is a particularly weighty public interest factor in favour of disclosure. However, when considering the weight the Commissioner must also acknowledge that the judicial review meant that the government had conceded that its original decision had to be reviewed.
23. However, the Commissioner has to balance these public interest arguments in favour of disclosure against those in favour of maintaining the exemption.
24. As noted above, the Commissioner has identified the arguments in favour of maintaining the exemption as safe space and chilling effect arguments. In considering the weight to give to safe space arguments

the Commissioner considers the timing of a request is of paramount importance. It is also important to take into account the age of the information, and whether the formulation and development of the policy in question was still underway at the time of the request.³

25. In this case the request was made shortly after the Secretary of State informed Sandwell MBC (and the other appellant local authorities) of his provisional decision in relation to the provision of BSF funding. As the request was made at a time when the Secretary of State had yet to reach a final decision on this issue, the DfE has argued that the decision making process for the formulation and development of this policy was ongoing. Bearing this in mind, the Commissioner is satisfied that at the time of the request the formulation and development of this policy was live and ongoing. He also considers that the withheld information directly related to the formulation and development of this policy by feeding into ministerial decision making for that process.
26. The Commissioner considers that significant and notable weight should be given to the safe space arguments in cases where the policy making process is live at the time of the request, and the withheld information relates directly to that policy making. In these circumstances there is a strong public interest in protecting the need for a private space to develop live policy, allowing ministers and officials the time and space *"to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy."*⁴. It is clear that disclosure in this case would impact on safe space. In these circumstances the Commissioner accepts that compelling public interest arguments in favour of disclosure are needed to result in disclosure. One such factor would be if the information clearly reveals wrongdoing, but this is not the only type of factor that is relevant. How the public would be impacted by the policy in question and how many people is also a relevant factor, including a consideration of whether the public had enough information about the impact to enable them to debate the policy whilst it was live. Whilst the Commissioner has acknowledged strong public interest factors in favour of disclosure, these particular factors are not clearly met.
27. In considering the weight to give to the chilling effect arguments the Commissioner considers that the central question is the content of the

³ *DfES v the ICO & The Evening Standard* [EA/2006/0006] para 75; *DBERR v the ICO & the Friends of the Earth* [EA/2007/0072] para 114.

⁴ [EA/2006/0006] para 75.

particular information in question.⁵ He also considers that the timing of the request will be important in relation to chilling effect arguments.

28. In this case the Commissioner notes that the withheld information in question contains free and frank advice on a highly controversial subject area, which involved the potential expenditure of large amounts of public money, and directly related to the provision of education in a specific local authority. He also notes that some of the withheld information was created a short time before the request was made.
29. As has been noted above, the decisions taken in relation to the BSF programme in July 2010 attracted a considerable amount of controversy and was a matter of considerable debate, both public and political. The outcome of the judicial review brought by the six local authorities, which led to the DfE being required to revisit its decision on BSF funding for these areas (a process that was still ongoing at the time of the request), ensured that this continued to be a matter of considerable debate at the time of the request.
30. Bearing in mind that the formulation and development of this policy was still very much a live issue at that time, the Commissioner accepts that those involved in providing advice for this process had a stronger expectation that the information would not be disclosed than if the matter had been concluded. Therefore, bearing in mind the timing of the request and the sensitivity and controversy of the issue under discussion, the Commissioner considers that the disclosure of the withheld information would be likely to have an inhibitory effect (i.e. a chilling effect) on those parties providing advice to support the formulation and development of this policy. He also considers that this inhibition would have been likely to have been severe and (at that time) frequent. The Commissioner accepts that the impact of disclosure would be significant, it would clearly be difficult for a government department to be asked to reconsider a matter following a judicial review and for the information to then be disclosed whilst it reconsidered its decision.
31. It is also relevant for the Commissioner to acknowledge the fact that the judicial review had already considered many of the issues surrounding the policy issue and this slightly lessens the public interest in disclosure, particularly related to the process followed.
32. Therefore, after considering all of the above points the Commissioner considers that in this case there are weighty public interest factors both in favour of disclosure and in favour of maintaining the exemption.

⁵ [EA/2006/0006] para 75(i).

However, due to the timing of the request, the Commissioner finds that the public interest in protecting the safe space necessary for the formulation and development of this policy particularly compelling and weighty.

33. Therefore the Commissioner has concluded that, in the circumstances of this case, the public interest in maintaining section 35(1)(a) outweighs the public interest in disclosure. Therefore this information should be withheld.

Other matters

34. Although it does not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern:

Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, although the complainant requested an internal review on 18 October 2011, the DfE did not communicate the result of the internal review until 29 December 2011.

Right of appeal

35. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

36. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
37. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF